Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

To: The Commission

REPLY COMMENTS OF DOBSON CELLULAR SYSTEMS, INC.
ON THE JOINT BOARD'S RECOMMENDED DECISION

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SUMMARY

The record demonstrates that the existing ETC designation process is sufficiently rigorous and thus the Joint Board's proposed guidelines are unnecessary. In addition, neither the Commission nor the states should impose guidelines that go beyond the confines of the statute. Furthermore, the Commission should stay the course with the public interest requirements and eligibility conditions set forth in *Virginia Cellular* and *Highland Cellular*. No commenters have shown that these requirements are not already sufficient for ensuring the rigorous designation process sought by the Joint Board. Equally important, neither the Commission nor the states should apply more rigorous requirements and conditions in non-rural territories under the guise of the public interest test.

Requiring only wireless ETCs to demonstrate adequate financial resources ignores the rural LEC dependence on universal service funds. The rural LECs would not be in business but for universal service funding, and, therefore, if the FCC requires such a showing for all ETCs, many rural LECs would no longer be eligible to hold ETC status. Also, the equal access and local usage requirements that some commenters are asking be applied to wireless ETCs also should be rejected outright. Consumers desire bundled services that includes local and long distance at one flat rate. This changed circumstance makes both local usage and equal access anachronisms that should not be forced on wireless ETCs at great cost with no real benefit to consumers. The Commission similarly must reject calls for imposing specific consumer protection requirements on wireless ETCs as such regulations are unnecessary in the highly competitive CMRS market and may harm competition.

The Commission must reject claims that the states have incentives to grant all ETC applications, regardless of the public interest considerations. As already noted, states are conducting rigorous proceedings. Additionally, the Commission must reject claims that the fund is ballooning as a result of the wireless ETCs or that the wireless ETCs do not need universal service support.

The Commission also must reject the unsupported primary line proposal and instead consider other means to limit fund size, including scrutinizing the level of support provided to the rural LECs. The Commission rather should address the fund size in a non-discriminatory fashion in the upcoming *High-Cost Support Mechanism* proceeding. In the meantime, the states and the FCC are rightly continuing with their ETC designation determinations.

Finally, the Commission should adopt its proposal to allow newly designated ETCs to begin receiving high-cost support as of their ETC designation date. Moreover, commenters have made a compelling case that ETC designation proceedings should be considered adjudicatory in nature.

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Dobson Cellular Systems, Inc. ("Dobson") hereby submits its reply comments in response to the FCC's *Notice of Proposed Rulemaking*[1] seeking comment on the *Recommended Decision* of the Federal-State Joint Board on Universal Service ("Joint Board").[2] As discussed below, Dobson agrees with those commenters that call on the Commission to reject the Joint Board's proposed ETC designation guidelines or to, in any way, limit wireless ETC designations based on public interest considerations beyond those already established under the *Virginia Cellular* and *Highland Cellular* decisions.[3] Furthermore, the issue of the size of the universal

[1] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Notice of Proposed Rulemaking*, 19 FCC Rcd 10805 (2004) ("*NPRM*").

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended Decision*, 19 FCC Rcd 4257 (2004) ("*Recommended Decision*").

[3] *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 1563, 1574-80 (2004) ("*Virginia Cellular*") (establishing public interest criteria); *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 6422, 6431-38 (2004) ("*Highland Cellular*") (elaborating on public interest criteria).

service fund is most properly studied and addressed in the recently initiated *High-Cost Support Mechanism* proceeding.[4]

DISCUSSION

I. ETC DESIGNATION PROCESS

A. Adequacy of Existing Eligibility Requirements

1. The Record Demonstrates that the Existing ETC Designation Process is Sufficiently Rigorous and Thus the Proposed Guidelines are Unnecessary

The Joint Board proposed permissive Federal guidelines for states to consider to ensure that the ETC designation process was both "rigorous" and "predictable."[5] Several commenters support Dobson's argument that the existing ETC designation process already is extremely rigorous, with proceedings taking years to complete and involving voluminous testimony, public hearings and documentation.[6] In its comments, Dobson detailed the extensive nature of the state ETC proceedings in which it is involved, noting how in Texas its application is being considered in three different parts.[7] The Commission therefore should not attempt to impose costly additional guidelines on carriers that are not only unnecessary but also could restrict competition in rural areas.[8]

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[4] *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support*, CC Docket No. 96-45, *Public Notice*, FCC O4J-2 (rel. Aug. 16, 2004) ("*High-Cost Support Mechanism*").

[5] *Recommended Decision*, 19 FCC Rcd at 4261.

[6] *See* Nextel Partners, Inc. ("Nextel Partners") Comments at 15 ("[T]he *Recommended Decision* is not proposing anything that states are not already doing."); Public Utility Commission of Oregon ("Oregon") Comments at 4 (states only designate ETCs after extensive hearings); Sprint Corporation ("Sprint") Comments at 21 (ETC designation process being conducted by the states and the FCC is "amply rigorous").

[7] Dobson Comments at n.5.

[8] *See* Rural Cellular Association and Alliance of Rural CMRS Carriers ("RCA") Comments at 10 (opposing ETC regulations which would "chill competitive entry" and are not competitively neutral).

Specifically, the Commission must not impose guidelines that go beyond the confines of the statute. Congress already has determined the existing minimum eligibility criteria for designation of all ETCs under Section 214(e)(1). The states should be limited by these same statutory requirements, as well. Dobson previously argued in its initial comments that the Fifth Circuit's *TOPUC* decision does not permit state commissions to impose additional eligibility requirements on wireless ETC applicants.[9] Dobson therefore supports commenters who call on the FCC not to acquiesce to this court decision.[10] As such, neither the Commission nor the states should impose guidelines that go beyond the statute.

2. The Commission Should Stay the Course with the Public Interest Requirements and Eligibility Conditions Set Forth in *Virginia Cellular* and *Highland Cellular* and Impose a Less Rigorous Public Interest Test in Non-Rural Areas

The Commission should not adopt the Joint Board's proposed guidelines and instead should "stay the course" with respect to the public interest requirements and eligibility conditions set forth in *Virginia Cellular* and *Highland Cellular*.[11] Strong support exists in the

[9] Dobson Comments at 6 n.8 (citing *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) ("*TOPUC*")).

[10] *See* RCA Comments at 35-38 ("The court … erred by failing to see that the statutory command that a state commission 'shall' designate a carrier that meets the requirements of Section 214(e)(1) as an ETC speaks directly to whether a state commission can impose additional eligibility criteria. … Congress did not disturb the language of Section 214(e) since subsection (e)(6) was added in 1997. Only the Commission's and the Joint Board's reading of Section 214(e) has changed and it has changed dramatically. … Simply professing deference to the Fifth Circuit's reading of Section 214(e) does not suffice as the Commission's reasoned judgment as to the meaning of the statute. A single circuit court cannot determine the meaning of an ambiguous statute for the entire nation … For that reason, the Commission is not required to follow the Fifth Circuit's approach to Section 214(e)(2) nationwide. Moreover, the Fifth Circuit construed Section 214(e)(2) in light of the 'states' historical role' in maintaining service quality standards for local service, a consideration that does not bear on the Commission's authority under Section 214(e)(6). Therefore, the Commission cannot simply acquiesce to *TOPUC*."); *see also* United States Cellular Corporation ("USCC") Comments at 9-10.

[11] *Virginia Cellular*, 19 FCC Rcd at 1574-80, 84-85; *Highland Cellular*, 19 FCC Rcd at 6431-38, 41-42.

record for such an approach.[12] No commenters have shown that these requirements are not already sufficient for ensuring the rigorous designation process sought by the Joint Board. Accordingly, Dobson agrees that these requirements and conditions should be given time to prove they achieve the Commission's intended purposes.

Furthermore, neither the Commission nor the states should apply these more rigorous requirements and conditions in non-rural territories under the guise of the public interest test. As noted by several commenters, under Section 214, the public interest test applied to ETC designations in non-rural ILEC services areas should be less stringent than the test applied to ETC designation petitions in rural ILEC service areas.[13]

[12] *See* ALLTEL Corporation ("ALLTEL") Comments at 5-6 ("[T]he ETC process as currently applied in practice by the states and by the Commission in the wake of the recent *Virginia Cellular* and *Highland Cellular* decisions is already rigorous … and should serve as the ultimate standard and be binding on the states."); AT&T Wireless Services, Inc. ("AWS") Comments at 4 ("Before adding even more factors to the already complicated ETC process, it would be prudent to allow a sufficient period of time to determine whether the existing criteria [established under *Virginia Cellular* and *Highland Cellular*] are having the desired effect."); Nextel Communications, Inc. ("Nextel Communications") Comments at 19 ("[T]he Commission should give the *Virginia Cellular* and *Highland Cellular* guidelines times to work as both federal and permissive state guidelines, rather than discarding them and moving to an untested set of principles that will only lead to a Balkanized set of ETC designation standards."); Western Wireless Corporation ("Western Wireless") Comments at Exh. C, p. 1 (while *Virginia Cellular's* guidelines are not perfect, they are "superior to the virtually limitless set of criteria set forth in the *Recommended Decision*."); *see also* CTIA-The Wireless Association ("CTIA") Comments at 9 (the FCC should adopt voluntary guidelines "provided they are no more stringent than those detailed in the FCC's *Virginia Cellular* and *Highland Cellular* Order").

[13] *See* CTIA Comments at 9-10 ("Section 214(e)(4) and (e)(6) of the Act clearly states that the public interest test applied to requests for ETC designation in non-rural incumbent LEC service areas should be less stringent than the test applied to requests for ETC designation in rural incumbent LEC services areas. The Commission should elaborate on its analysis in the *Virginia Cellular* and *Highland Cellular Order* to make clear that petitions for ETC designation in non-rural incumbent LEC service areas are subject to a lower public interest threshold."); ALLTEL Comments at 6 ("ETC applications in non-rural areas need not meet the same standards as rural areas, given the bifurcated standard contained in Section 214 of the Act."); Western Wireless Comments at Exh. C, p. 1 ("The statute deems designation of additional ETCs in *non-rural* ILEC areas to be *per se* in the public interest as long as they offer the services included within the 'definition of universal service' and meet the other statutory criteria.").

B. Additional Federal Guidelines

1. Requiring Only Wireless ETCs to Demonstrate Adequate Financial Resources Ignores RLEC Dependence on Universal Service Funds

Dobson argued in its comments that if the Commission finds it necessary to adopt a guideline requiring a showing of adequate financial resources, such showing must be required of *all* ETC applicants and *all* designees at each re-certification in the interests of competitive neutrality.[14] As noted in the comments, the RLECs would in fact not even be in business but for the universal service funding. Accordingly, while wireless ETC applicants such as Dobson would have no problem demonstrating adequate financial resources (by virtue of already being qualified to be an FCC licensee), the incumbents may very well be unable to demonstrate that they have adequate financial resources to serve rural areas without universal service funding. Thus, should the Commission adopt an adequate financial resources guideline, many rural LECs would no longer be eligible to hold ETC status.[15] Since this guideline is unnecessary for CMRS carriers who have already made such a showing in order to obtain their wireless licenses, and would be difficult if not impossible to meet for rural LECs, the Commission should reject this proposed guideline.[16]

[14] Dobson Comments at 7; *see also* RCA Comments at 29 ("ILECs were not required to pass any financial qualification test before being designated as ETCs. Thus, it is not competitively neutral to impose such a standard on new ETCs.").

[15] *See* USCC Comments at 49-50 ("In recommending that these standards be imposed, the Commission runs the risk of disqualifying numerous rural LECs who have freely admitted that they would not be in business without high-cost support.").

[16] In addition, some commenters correctly note that this guideline would be duplicative anyway of the "commitment and ability" guideline. Oregon Comments at 4; Western Wireless Comments at Exh. C, p. 2.

2. The Record Does Not Support Imposing Equal Access Requirements on Wireless ETCs and Such a Requirement Would Not Benefit Consumers

The record offers strong support that the Commission should reject the Joint Board's recommendation that encourages states to require wireless ETCs to provide equal access if all other ETCs depart the market.[17] Many commenters soundly opposed such a requirement,[18] but, more importantly, those asking that the FCC impose such a requirement offered no explanation of how this requirement would benefit consumers in light of the way telephone service is packaged and priced today.[19] As Dobson noted in its comments, "[t]he competitive environment is rapidly making the concept of equal access an anachronism – for wireline as well as wireless carriers, ETCs or not."[20] Both wireless and wireline carriers, reacting to the consumers' dislike of distance-sensitive pricing, have begun offering bundled packages of "any-distance" minutes.

In light of the overwhelming reasons noted by commenters demonstrating that imposing any equal access requirement upon wireless ETCs would be contrary to law and the public interest, the Commission should finally declare in this proceeding that equal access has no place

[17] *See Recommended Decision*, 19 FCC Rcd at 4268-69.

[18] CTIA Comments at 11 (equal access is not supported by the universal service mechanism and Congress had already decided this issue); Nextel Communications Comments at 24 ("Allowing state commissions to impose equal access requirements and, in effect, split CMRS into separate components would undermine years of Commission precedent treating the provision of CMRS as a single, integrated national service offering."); Sprint Comments at 28-29 (imposing equal access requirements would discourage beneficial, pro-consumer offerings such as the wireless programs that do not distinguish between local and long-distance calls, which wireline carriers are mimicking with their bundled offerings); Western Wireless Comments at Exh. C, p. 3 (equal access requirements violate § 332(c)(8) and are unnecessary since CMRS carriers lack market power over long distance).

[19] *See* National Association of State Utility Consumer Advocates ("NASUCA") Comments at 38; The Nebraska Rural Independent Companies ("Nebraska Rural") Comments at 7; TDS Telecommunications Corporation ("TDS") Comments at 9.

[20] Dobson Comments at 10.

as a requirement of wireless ETCs.[21] The continued efforts by LECs to impose such requirements on wireless ETCs is plainly self-serving, anti-competitive, and needlessly would divert precious universal service dollars to fund the wireless ETCs' costs of providing equal access.

3. The Commission Must Reject Calls for Imposing Specific Consumer Protection Requirements on Wireless ETCs as Such Regulations Are Unnecessary and May Harm Competition

No commenters put forth any specific instances of wireless service quality shortfalls that would justify the imposition of increased consumer protection requirements on wireless ETCs. Yet the Independent Telephone & Telecommunications Alliance ("ITTA"), for example, argues that all CETCs should be subject "to the same customer service standards (*e.g.*, E-911 capability, local number portability, call completion rates, repair times) and the same service quality reporting requirements as the states impose on ILECs."[22] NASUCA, SBC and USTA also make similar arguments – *i.e.*, whatever applies to ILECs, whether at the states or at the FCC, should also be imposed upon CETCs.[23]

Dobson and other commenters object to such specific requirements, particularly because the intended purpose of these requirements is to control the market power of ILECs – regulations

[21] The issue of whether to impose equal access obligations on wireless ETCs has been ongoing since the Commission's proceeding reviewing the definition of supported services. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Order and Order on Reconsideration*, 18 FCC Rcd 15090, 15093 (2003) (noting that the Joint Board could not decide whether to recommend that equal access be required and therefore the Commission would consider the issue in this proceeding).

[22] ITTA Comments at 27.

[23] NASUCA Comments at 39 ("[ETCs should] be subject to the consumer protection rules, including billing and collection rules, that apply to ILECs in the state. … CETCs should be subject to all consumer assistance, mediation, or adjudication processes that are normally employed by the state to protect ILEC customers."); SBC Communications Inc. ("SBC") Comments at 7 (to level the playing field, CETCs should be held to the same requirements as the ILECs, *i.e.*, truth-in-billing and CPNI requirements); United States Telecom Association ("USTA") Comments at 10-11 & n.21 (current consumer protections and regulations applicable to ILECs that relate to universal service should be applied to all new ETCs, including measures relating to: disconnections, deposits, billing, reporting requirements, customer rep service answer time, operator answer time, etc.).

that are not necessary in the highly competitive wireless industry.[24] While RLECs are monopolies, rural CMRS carriers such as Dobson are not. The Commission's *Ninth Report* on CMRS competition states that 97 percent of the U.S. population is served by three or more mobile carriers.[25] As such, customers unhappy with their wireless service can easily switch carriers or not subscribe at all to certain carriers, which will prevent those carriers from receiving universal service support. The self-regulating nature of wireless service effectively prevents carriers with poor service from receiving ETC funding. The Commission has in the past stated that it will not regulate for the simple sake of regulation.[26] But this is what the Joint Board, many LECs and other consumer organizations are requesting – upward regulation. Regulating wireless carriers to the same extent as ILECs – when such regulation is not necessary to control the market power of wireless carriers – only will serve to harm consumers by increasing costs to carriers and further straining the universal service fund.[27]

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[24] *See, e.g.*, Western Wireless Comments at 20 & Exh. C, p. 3 (calling for the rejection of ILEC consumer protection requirements being applied to wireless carriers); USCC Comments at 35 ("states have imposed monopoly-style regulations on ILECs not as a *quid pro quo* for ETC status, but because consumers must be protected from monopoly business practices"). USCC also argued that "unless service quality standards are imposed on ILECs *as a condition of their ETC designation*, it is not competitively neutral to impose ILEC-like service quality standards on other classes of carriers as a condition of obtaining or retaining ETC status." USCC Comments at 33. *See also Orloff v. FCC*, 352 F.3d 415, 418-420 (D.C. Cir. 2003) (affirming FCC decision that found that because of the competitive nature of wireless services, market forces prevented unreasonable discrimination by carriers that offered different deals or concessions to different customers) (citing *Orloff*, 17 FCC Rcd 8987, 8996 (2002)).

[25] *FCC Adopts Annual Report on State of Competition in the Wireless Industry*, WT Docket No. 04-111, *News Release*, FCC 04-216 (rel. Sept. 9, 2004).

[26] *See, e.g.*, *NPRM* at ¶ 62 ("Any consumer protection requirements imposed on ETCs should further the universal service goals contemplated in section 254(b) of the Act, and should not be imposed merely for the sake of regulatory parity."); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, 3321 (2004) (stating that the Commission would not require pulver.com to locate its members in order to determine whether the traffic should be classified as interstate or intrastate because such action "would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose. The Act counsels against it, and we decline to do it.").

[27] Commissioner Abernathy recently echoed this sentiment. *See* Commissioner Kathleen Q. Abernathy, Guiding Principles for the Age of Convergence, Address at the FCBA Annual Meeting (June 24, 2004) ("[T]here is

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4. A Local Usage Requirement for Wireless ETCs Must Be Rejected as Unnecessary Because of the Disappearing Distinction between Local and Long-Distance Calling

Several commenters recognized that distinctions between local and long-distance service are becoming obsolete, therefore making a local usage requirement no longer necessary.[28] A local usage requirement for wireless ETCs is unnecessary for a number of reasons. As Dobson noted in its comments, it is evident that the concept of a local calling area and indeed the distinction between "local" and "long-distance" calls is inconsequential because the rate plans that are being offered by both wireless and wireline carriers include plans of bundled minutes at a single monthly rate, irrespective of whether the call is "local" or "long distance." Further evidence can be found in the sheer number of long-distance minutes that have disappeared from the wireline arena.[29] Manifesting trends in consumer preferences, consumers simply are no

(footnote continued)
no doubt in my mind that we would not have seen the robust price competition and high degree of innovation we enjoy today if not for the Commission's decision in the early 1990s to refrain from imposing heavy-handed common carrier regulation on PCS services. … Wherever calls for heavy-handed regulation have been beaten back – in the wireless sector, in the broadband arena, and in the information services marketplace – consumers have enjoyed a high degree of innovation, good service quality, generally declining prices, and a choice of providers.").

[28] Centennial Communications Corp. ("Centennial") Comments at 8 ("[I]t is long past the time that any serious industry observer could conclude that restricting affordable calling to such small 'local' areas today serves anything other than the landline carriers' interest in receiving toll charges from end users, access charges from long distance carriers, or both."); Oregon Comments at 5 (local usage is not a reasonable guideline, because this element of a carrier's rate structure "may be starting to disappear in the marketplace" as a result of plans that include local and long distance at one fixed rate); USCC Comments at 37 ("[R]egulation of minimum local usage is unworkable and will have uniformly negative consequences for consumers, who now enjoy a wide selection of rate plans, as well as mobility and wider local calling areas that the FCC and many states have found to serve the public interest."); Western Wireless Comments at Exh. C, p. 4 (noting the harm that such a requirement would bring to consumers, as it would limit their access to innovative rate plans).

[29] Greg Edwards, *Verizon Long-Distances Rates May Drop, Rural Local Rates May Rise in Virginia*, RICHMOND TIMES-DISPATCH, June 19, 2004 ("Verizon's access-charge income has been declining because … consumers have been using fewer long-distance minutes in favor of wireless calls, e-mail and instant messaging."); Alice Z. Cuneo and Bradley Johnson, *AT&T Disconnected; Botched wireless, broadband strategies leave brand as vulnerable as venerable*, ADVERTISING AGE, May 10, 2004, at 1 ("The long-distance market is declining amid competition from Baby Bells, wireless and e-mail."); *Fast Fact*, RCR WIRELESS NEWS, Apr. 5, 2004, at 26 ("According to a new study by the Yankee Group, wireless usage in the U.S. is accelerating the decline of landline use. The biggest impact is in long-distance minutes, where wireless users make about 43 percent of their long-distance calls from a wireless device."); *U.S. Telecom Industry Spending to Rise 6.8 Percent in 2004, TIA Predicts*,
(continued on next page)

longer using their wireline, distance-sensitive phones to make long-distance calls, and instead, are using services – including wireless as well as new IP-enabled services – that are not distance-sensitive.

Those advocating that a local usage requirement should be imposed on wireless carriers ignored all of the evidence of how obsolete this concept has become. None of the commenters who supported a local usage requirement offered an explanation of how such a requirement would benefit consumers in the wake of the disappearing distinction between local and long-distance service.[30]

C. Public Interest Considerations

1. The Commission Must Reject Claims that States Have Incentives to Grant All ETC Applications, Regardless of the Public Interest Considerations

Verizon claims that states have the perverse incentive to grant multiple ETC petitions, "because it leads to more universal service funding for that particular state."[31] It is certainly not Dobson or several other carriers' experience that states are eager to grant ETC petitions to increase funding for their state.[32] In fact, as noted above, many wireless ETCs have presented

(footnote continued)
TELECOMWEB NEWS DIGEST, Jan. 26, 2004 (In 2003, "[t]oll-service spending fell 8.2 percent to $78 billion, its third consecutive decrease as the shift from wireline to wireless in long-distance traffic continued.").

[30] Coalition of State Telecommunications Associations and Rural Telephone Companies ("Coalition") Comments at 8, 12; CenturyTel, Inc. ("CenturyTel") Comments at 8; Iowa Utilities Board ("Iowa") Comments at 4; ITTA Comments at 25-26; NASUCA Comments at 39-40; TDS Comments at 8.

[31] Verizon Comments at 12.

[32] Dobson Comments at n.5 (noting the several examples of the rigorous proceedings Dobson is experiencing with the state commissions, including a Texas proceeding that required Dobson to split its ETC application into three parts). Furthermore, the Idaho Public Utilities Commission recently affirmed on reconsideration its denial of two wireless ETC petitions. Clear Talk Communications was denied ETC designation "because it appeared the carrier planned to serve only the low-cost, high-revenue portions of its study area, leaving wireline incumbents to serve the remote portions of its study area." Nextel Partners also was denied ETC designation because the "PUC concluded that it had no facilities to serve the remote portions of its study area," even though Nextel had presented new plans for building nine new cell sites once it received ETC subsidies. *State Telecom Activities*, COMM. DAILY, Sept. 15, 2004, at 9.

evidence that they are facing very rigorous proceedings at the state level,[33] which contradicts Verizon's unsupported claims, as well as the suggestion that some designations are not in the public interest.

2. The Commission Must Reject Claims that the Fund is Ballooning as a Result of the Wireless ETCs or that Wireless ETCs Do Not Need Universal Service Support

Commenters are incorrect that the fund size is spiraling out of control due to wireless ETC designations. These allegations cannot form a basis for denying qualified wireless ETC applicants under the guise of the public interest standard. Specifically, some commenters supported a cost-benefit analysis or a national benchmark of per-line support that would be used by the states or the FCC to determine whether designating an additional ETC is in the public interest.[34] Despite repeated, well-supported showings that the designation of wireless ETCs contributes a relatively very small amount to the overall fund size, many commenters argue for a drastic step: return of the monopoly era or, at most, very limited designation of multiple ETCs in rural areas.[35] Dobson has repeatedly shown that designation of wireless ETCs presents no imminent threat to the fund, and the modest increases in demand on the fund because of wireless

[33] *See supra* Section I.A.1.

[34] *See, e.g.*, AT&T Corp. ("AT&T Corp.") Comments at 26 (the FCC should adopt a cost-benefit test or a national benchmark of per-line support over which a state or the FCC would have the burden to demonstrate that an additional ETC is in the public interest); GVNW Consulting, Inc. ("GVNW") Comments at 12 (asking FCC to require "a rigorous, fact-intensive, cost-based analysis"); National Telecommunications Cooperative Association ("NTCA") Comments at 21-22 (supporting calls for a cost-benefit analysis); NASUCA Comments at 43 (noting approval of the economic public interest benchmarks first proposed by Joint Board member Billy Jack Gregg).

[35] *See, e.g.*, John Staurulakis, Inc. ("JSI") Comments at 4-5 (that there will be instances when a natural monopoly better serves the public interest); SBC Comments at 8-9 (multiple ETCs could produce "undue strains on the fund"); South Dakota Telecommunications Association and Townes Telecommunications, Inc. ("SDTA") at 9 (the FCC and states should examine whether an additional ETC would result in uneconomic competition); USTA Comments at 2 (if no carrier can provide service to customers without USF support, there is no economic justification to support more than one carrier); Verizon Comments at 9 (unless there are extraordinary circumstances, it is presumptively not in the public interest to grant ETC status to more than one carrier in a rural study area).

ETC designation is minor compared to the $1 billion increase in payments to rural LECs that has occurred in just the last three years.[36] Moreover, the Commission has recently initiated a proceeding to address the fund size.[37] Thus, there is no need to take action that is motivated by fund-size concerns in this proceeding.

Further, despite claims to the contrary, rural wireless carriers are in need now more than ever of universal service support. As the nationwide wireless carriers have built their own facilities along the highway corridors in rural areas, roaming revenues for rural wireless carriers such as Dobson have steadily decreased.[38] The higher deployment costs resulting from wireless technology improvements, combined with the downward trend in roaming revenues, have increased the need for universal service funding.

Verizon attempts to fault carriers for seeking universal service support in light of the availability of roaming revenues.[39] Citing to Dobson's ETC petitions for designation in New York, Verizon argues that carriers should not receive funding when they already have been able to build out their networks without funding, noting Dobson's recognition that roaming "has

[36] *See, e.g.*, Reply Comments of Dobson Cellular Systems, Inc. and American Cellular Corporation, Joint Petitions for Designation as Eligible Telecommunications Carriers in the State of New York, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 14-15 (filed July 6, 2004) ("Dobson New York Reply Comments") ("[E]ven if *every* CMRS carrier in the country received ETC designation, competitive ETCs still would receive *only about one-third* of all high cost funding, with the remaining two-thirds of the fund going to rural ILECs. This apparently would be true even though there are up to six CMRS carriers serving most areas, but only one ILEC. Even if accurate, then, these commenters' doomsday estimates are perhaps the best possible demonstration that funding competitive ETCs is no real threat to the sustainability of the fund.").

[37] *See High-Cost Support Mechanism*, FCC O4J-2.

[38] Joint Petition for Designation as Eligible Telecommunications Carriers in the State of New York (No Rural Redefinition Requested), *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 12-14 (filed May 3, 2004) ("No Redefinition Petition").

[39] Verizon Comments at 12 ("The fact is that many petitioners are seeking ETC status in areas where they *already* provide service, even *without* universal service support.").

provided valuable revenue streams to finance costly deployment to serve rural customers …"[40] Verizon, however, failed to address the very next sentence of Dobson's petitions, which stated: "Today, however, there is greater facilities deployment by large national carriers of their own facilities along the corridors, and marketplace pressures have reduced intercarrier roaming rates nationwide."[41]

Moreover, as Dobson pointed out in its petition for ETC designation in New York, Dobson does not simply focus its deployment in rural areas to the highway corridors. Dobson faces high costs because it is committed to extending its networks into the sparsely populated rural towns and communities that lie well beyond major highway corridors. Universal service funding is necessary for wireless carriers to provide high-quality wireless coverage in these very rural areas. On the one hand, the LECs argue that wireless carriers do not deserve support because of lack of service quality or general service availability where rural customers live and work; yet, on the other hand, they also argue that either roaming revenues or private capital markets are sufficient to fund wireless investment in rural areas. The LECs cannot have it both ways, nor should the Commission forget that most RLECs would not be able to provide service in rural areas but for the universal support they receive.[42]

II. THE COMMISSION MUST REJECT THE UNSUPPORTED PRIMARY LINE PROPOSAL AND INSTEAD SHOULD CONSIDER OTHER MEANS TO LIMIT FUND SIZE, INCLUDING SCRUTINIZING THE SCOPE OF SUPPORT GIVEN TO THE RURAL LECS

The overwhelming majority of commenters opposed limiting support to a primary line. In fact, in a uniquely uniform fashion, the proposal was rejected by a wide cross-section of

[40] Verizon Comments at n.29 (quoting No Redefinition Petition at 14).

[41] No Redefinition Petition at 14.

[42] *See supra* Section I.B.1.

commenters, including RLECs, ILECs, wireless carriers and several states.[43] With such substantial opposition, the Commission must reject the notion that limiting support to a primary connection is an effective mechanism to manage the size of the universal service fund. As will be discussed in Section III below, commenters proposed a multitude of other viable alternatives for reducing the strain on the fund that, contrary to the misguided primary line proposal, are competitively neutral and administratively feasible.

Furthermore, as was discussed above, Dobson and many others have repeatedly rejected the notion that "the sky is falling" with respect to the fund. OPASTCO and NASUCA both assert that "if all wireless carriers became ETCs – a not unlikely possibility given current

[43] *See, e.g.*, CenturyTel Comments at 18 (the primary line proposal "would increase carriers' marketing and administrative costs, leaving fewer resources to invest in rural networks" in part because "limiting support to a single line or connection per household or per customer is fraught with administrative costs and difficulties."); Oregon Comments at 7 (primary line proposal requires too much fundamental change in the way USF is administered and involves too many practical issues that would have to be resolved prior to implementation); BellSouth Corporation ("BellSouth") Comments at 9 (arguing against proposal because it "ignores the realities of constructing and maintaining a network" and because of the administrative challenges associated with implementing the proposal); Mid-Sized Carriers Coalition ("Mid-Sized Carriers") Comments at 20-21 (the primary line proposal would call into question the FCC's compliance with the requirement to provide ETCs with sufficient and predictable universal service support and "substantial carrier and regulatory resources would have to be dedicated to maintaining such a system, thereby diverting resources that would otherwise be used to deliver service to rural and high-cost areas."); Rural Telecommunications Associations ("RTA") Comments at 16-17, 20-22 (the primary line proposal will not allow rural carriers to recover their investment in the network and the prospect of loss of support and revenue instability will discourage investors and lenders from providing capital to small rural carriers); Sprint Comments at 14-18 (FCC does not have authority "to arbitrarily direct funds away from one disfavored category of companies and toward another, favored group, where both groups equally satisfy the statutory prerequisites for funding" and there is no rational way for consumers to choose a primary line unless they could foresee the "real consequences" of their choice); USTA Comments at 16-18 (the primary line proposal will not provide carriers with enough funds and/or predictable support to provide quality services to customers or to build and maintain their networks, and therefore will have the effect of impeding consumer access to information services and will harm small businesses in rural communities); ITTA Comments at 6, 12-13 (the proposal "would almost certainly provide rural consumers lesser access to [advanced] services at higher rates compared to urban consumers" while also diverting resources from infrastructure investment to other uses, such as spending on advertising to consumers in high-cost areas); Iowa Comments at 7 (noting the negative impact such a proposal could have on small rural service providers); Coalition Comments at 13-15 (the proposal is too costly to administer and potentially could lead to loss of investment in rural areas); Western Wireless Comments at 5, Exh. B (restricting support to primary lines would treat the "rural consumer as second-class citizens" and would reduce incentives for wireless carriers to deploy and upgrade facilities in rural areas).

policies – the federal [USF] would increase by $2 billion in short order."[44] These commenters also claim that "[t]he wireless ETCs have avoided addressing [this] estimate."[45]

Dobson has not avoided addressing this estimate, and, in fact, has addressed it directly. Dobson stated in reply comments for its NY ETC petitions:

> [E]ven if *every* CMRS carrier in the country received ETC designation, competitive ETCs still would receive *only about one-third* of all high cost funding, with the remaining two-thirds of the fund going to rural ILECs. This apparently would be true even though there are up to six CMRS carriers serving most areas, but only one ILEC. Even if accurate, then, these commenters' doomsday estimates are perhaps the best possible demonstration that funding competitive ETCs is no real threat to the sustainability of the fund. As can be seen, even under the worst-case scenarios presented by commenters, the increase in support levels from ETC designation will be relatively modest. If anything, the fund is threatened by bloated payments to rural ILECs, which have increased by over $1 billion in the last three years.[46]

The numbers speak for themselves. Despite NASUCA and OPASTCO's claims that the "sky is falling" because of wireless ETCs, quite the opposite is the case. If funding to any particular group of carriers should be strictly scrutinized or limited, it should be for the RLECs, who have received years of support for long-built networks in rural areas, yet benefited from a $1 billion increase in payments in just the last three years.[47] Instead of repeating exaggerated estimates, the rural LECs should take meaningful, constructive steps of their own to reduce the

[44] NASUCA Comments at 9-10 (quoting OPASTCO *Ex Parte* (filed Jan. 28, 2003)).

[45] *Id.*

[46] Dobson New York Reply Comments at 14-15.

[47] In addition to receiving excessive USF support, it now appears that NECA-participating carriers may have been over-earning on their access charges as well. The Pricing Policy Division of the Wireline Competition Bureau has designated for a broad-reaching investigation whether the revised rates in NECA's annual access tariff are unjust or unreasonable in violation of Section 201 of the Act, "particularly whether NECA's rate development methodology has resulted in consistent overearnings." *In the Matter of July 1, 2004 Annual Access Charge Tariff Filings*, WC Docket No. 04-72, *Order Designating Issues for Investigation*, DA 04-3020, ¶ 1 (Pricing Policy Div., rel. Sept. 20, 2004).

disproportionate amount of support flowing to them, such as finally disaggregating support so that funds for all ETCs are directed to the highest-cost areas.

III. THE STATES AND THE FCC ARE RIGHTLY CONTINUING WITH THEIR ETC DESIGNATION DETERMINATIONS WHILE THE BASIS FOR SUPPORT IS ADDRESSED IN THE IMMINENT *HIGH-COST SUPPORT MECHANISM* PROCEEDING

The states and the FCC continue to find that designating wireless ETCs is in the public interest, notwithstanding the fact that the basis of support has not yet been resolved. Such designation determinations can and should continue, since the *High-Cost Support Mechanism* proceeding is about to be addressed and because fund growth for competitive ETCs is modest. In the recent designation of Nextel Partners as an ETC in several states, the Wireline Competition Bureau itself noted the ongoing proceedings and correctly declined "to delay ruling on pending ETC petitions and to impose additional requirements at this time."[48]

The Bureau also stated that it did not believe granting the ETC petitions of Nextel Partners would "dramatically burden the universal service fund" because "even assuming that Nextel captures each and ever customer located in the affected study areas, the overall size of the high-cost support mechanisms would not significantly increase."[49] Accordingly, the states and the Commission should continue considering and granting ETC petitions in due course. Given that the greatest drain on the fund is bloated support to rural LECs, it would be patently unfair to hold up support to efficient intermodal competitors while a solution is sought.

[48] *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners, Petition for Designation as an Eligible Telecommunications Carrier in the state of Alabama, et al.*, CC Docket No. 96-45, *Order*, DA 04-2667, ¶ 21 & n.67 (WCB, rel. Aug. 25, 2004).

[49] *Id.*

Commenters proposed numerous ideas for controlling the fund growth for the Commission to consider.[50] Dobson will offer further elaboration on its proposals to control the fund size during the comment cycle in the *High-Cost Support Mechanism* proceeding. Because of the enormous opposition to the primary line connection proposal and the numerous other methods proposed to control fund growth, the Commission should not use this proceeding, focused on ETC designation, as a way to control the size of the fund. The Commission should instead consider the more complete record to be developed on this issue in the *High-Cost Support Mechanism* proceeding to focus on the real issues affecting fund size.

IV. OTHER ISSUES

A. The FCC Should Adopt its Proposal to Allow Newly Designated ETCs to Begin Receiving High-Cost Support as of Their ETC Designation Date

Several commenters supported the Commission's proposal to allow newly designated ETCs to begin receiving high-cost support as of their ETC designation date, provided that the required certifications and line-count data are filed within 60 days.[51] Notably, USAC, which works with the FCC and the states to distribute universal service funding, stated that amending the rules to permit ETCs to receive support as of their designation date would not impose a

[50] *See, e.g.*, Nextel Communications Comments at 11-16 (the Commission should consider the following: (a) freeze per-line high cost support in a study area upon competitive ETC entry, without the Joint Board options for ensuring continued support for rural LECs and without further adjustment based on the rural carrier's embedded costs; (b) modify the rule that permits inclusion of corporate operations expenses in the calculation of rural LEC study area loop costs; (c) "immediately transition all ETCs with over 50,000 supported lines in a study area to a forward-looking cost methodology, while establishing a phased-in approach for those rural LECs with less than 50,000 supported lines"; and (d) "consolidate multiple study areas under common ownership within a state"); Oregon Comments at 8 (the FCC should cap the Universal Service Contribution Factor; once capped USF should grow only in proportion to the size of the interstate telecommunications market). Moreover, several commenters supported the Rural Task Force's proposal to freeze per-line support available in a service area upon entry by a competitive ETC. *See* AT&T Corp. Comments at 17-21; AWS Comments at 5; CTIA Comments at 21; General Communications, Inc. ("GCI") Comments at 28; Sprint Comments at 8-9; Western Wireless Comments at 18.

[51] Centennial Comments at 18-19; CTIA Comments at 13; Sprint Comments at 34; Western Wireless Comments at Exh. C, p. 5.

significant burden on it.[52] Because this proposal received USAC's support and will decrease the administrative burdens on the state and the FCC, the Commission should adopt this proposal.

B. ETC Designation Proceedings Should Be Considered Adjudicatory in Nature

Dobson supports RCA's and USCC's calls for the Commission to treat ETC designation proceedings as adjudicatory in nature. As aptly noted by USCC: "Designation as an ETC is a 'license' under the APA, because it serves as the Commission's 'permit, certificate, approval … or other form of permission' to receive federal universal service support."[53] The grant or denial of licenses is clearly an adjudication under the Administrative Procedures Act ("APA").[54]

The Commission, however, provides conflicting signals as to whether it treats ETC proceedings as a rulemaking or as an adjudication. The Commission always engages in fact-specific analysis and often acts in these proceedings under delegated authority, giving credence to the idea that it is treating the proceeding as an adjudication. But the Commission also seeks public comment on the petitions and engages in quasi-rulemaking activity (*i.e.*, establishing new public interest determinations in *Virginia Cellular*), indicating that it is acting under rulemaking authority.[55]

Because the requirements of the APA clearly require that the "licensing" of ETC designations be classified as an adjudicatory proceeding that affords the applicant certain due process rights, "[t]he Commission should take the opportunity of this rulemaking to put

[52] USAC Comments at 19 (stating that support cannot begin, however, until the carrier's line count information is included in USAC's quarterly demand projection to the FCC).

[53] USCC Comments at 15.

[54] USCC Comments at 16 (citing 5 U.S.C. § 551(7)).

[55] USCC Comments at 16-18.

appropriate adjudicatory rules in place."[56] Specifically, the Commission must not subject ETC petitions to notice and comment.[57] Also, the Commission should require that ETC proceedings be restricted, banning *ex parte* presentations until the proceeding is no longer subject to Commission or judicial review.[58]

[56] USCC Comments at 18.

[57] USCC Comments at 17.

[58] RCA Comments at 47-48 ("In order to ensure the fairness and integrity of its decision-making in ETC designation cases, the Commission should amend Section 1.1208 to explicitly include applications for ETC designation as among the proceedings identified as 'restricted.'").

V. CONCLUSION

Foisting ILEC monopoly era regulations onto the highly competitive wireless industry would not serve the public interest. The Commission therefore should reject claims for increased scrutiny on wireless ETCs – whether as new designation guidelines or under the guise of the public interest test – if such scrutiny is either not equally applied to ILECs or would harm competition by requiring wireless carriers to comply with regulations meant to control the market power of LECs. The strong competitive forces in the wireless industry ensure that wireless carriers deploy high quality services, and this is no less true when wireless carriers receive ETC designation. The benefits that competitive wireless ETCs bring to rural areas should not be squandered by placing a disproportionate burden of controlling fund size upon wireless ETCs. As such, the Commission should reject the primary line proposal and rather address new methods for controlling the fund size in the upcoming *High-Cost Support Mechanism* proceeding.

Respectfully submitted,

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